THEODORE KOEHN,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

JOSEPH LIEBLEIN,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

GUSTAVE SCHMIDT,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

Opinion of the Court Below.

The majority opinion of the Circuit Court of Appeals appears following page of the Record and is followed immediately by the minority opinion.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. C. C. 347).

(2) The judgment of the Circuit Court of Appeals was entered January 31st, 1946.

III.

Statement of the Case.

A full statement of the case is included in the preceding petition under Title III.

IV.

ARGUMENT.

POINT I.

(Reasons (1) (2).)

The Foreign Agents Registration Act of 1938, as amended in 1939, only applied to agency by express contract, prior to the amendments in 1942. A question of law involving the construction and application of such United States statute now rests upon a divided opinion of the Circuit Court of Appeals, and has not been, but should be, determined by this Court.

The indictment under which petitioners were convicted was based upon the Foreign Agents Registration Act of June 8, 1938 (52 Stat. 631), as amended by the Act of August 7, 1939 (53 Stat. 1244). Sec. 2, for which failure to observe renders criminal liability, provides that: "* * * an agent of a foreign principal shall * * * file a statement * * * which shall set forth * * *".

(a) The name, business address, and residence address of the registrant;

(b) The name of the foreign principal or other person or organization for which such person is acting as agent;

(c) A copy of all contracts of employment under which such person acts or agrees to act as such agent, if written, or a full statement of the terms and conditions thereof, if oral;

(d) The date when each such contract was made, the date of commencement of activity thereunder, and the period during which such contract is to be in effect;

(e) The compensation to be paid, if any, and the form and time of payment, under such contract;

(f) The name of every foreign principal, or other person or organization which has contributed or which has promised to contribute to the compensation provided in such contract; and

(g) If the registrant be a partnership, association, or corporation, a true and complete copy of its charter, articles of incorporation, copartnership, association, constitution, and by-laws, and any other instrument or instruments, relating to its organization, powers, and purposes.

From the foregoing it is evident the Act only applies to agency created by express contract, written or oral, but not to a status of agency inferred from conduct. Subdivision (g) starts with "If". There is no such "If" proviso as to subdivision (a) to (f). It is evident that only agency arising from an express contract would subject the agent to registration, for only then could subdivision (c) to (f) be applicable without qualification.

The 1942 amendments to the Act (56 Stat. 249) revised the 1938 Act as amended. The 1942 Act includes in its definition of agent, Sec. 1,

> "Any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be *whether or not pursuant to contractual relationship,* a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;"

and Sec. 2, pertaining to registration, provides:

sub. 4,

> "* * * or, *where no contract exists,* a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; * * *"

sub. 9,

> "* * * or, *where no contract exists,* a full statement of all the circumstances, by reason of which the registrant is performing or assuming or purporting or has agreed to perform for himself or for a foreign principal or for any person other than a foreign principal any activities which require his registration hereunder;"

The matter in italics was not included in the 1938 Act. The Act as revised in 1942 includes situations of agency which may come into existence without an express contract. Such provisions not being in the 1938 Act upon which the indictment was based, cannot be implied. A criminal statute must be applied as it is written. It cannot be rewritten under the guise of interpretation by extraneous definitions. The application of the 1942 Statute, *ex post facto,* is not to be justified by denominating it as clarifying or declaratory of the previous Act. (*Viereck* v. *United States,* 318 U. S.

236, p. 247.) While the decision in the *Viereck* case did not directly pass on the particular question of law involved herein, it did re-iterate the long established principle that one may only be subjected to punishment for crime in the federal court for the commission or omission defined by Statute, not merely implicit therein.

The 1942 Act does, by its own language, apply to any agency "whether or not pursuant to contractual relationship." The language of the Act of 1938 as amended, prior to the 1942 amendments, without the aid of extraneous definitions and probably implicit meanings, cannot pertain to any agency not created by express contract. The extraneous definition of agency quoted by the lower courts, while acceptable in civil litigation, cannot be the basis of a conviction of a crime which is not adequately and with full certainty expressed in the penal statute. Congress had the same English language at its command in 1938 and 1939 as it had in 1942.

The Court below divided on the construction and application of the Act of June 8, 1938 (52 Stat. 631), as amended by the Act of August 7, 1939 (53 Stat. 1244), with the dissenting opinion (Biggs, *C. J.*) upholding petitioners' contention. No adjudication has been made by this Court on this particular application of the Statute. The present construction by the Court below is untenable and involves a question of substance relating to a Statute of the United States which should be settled by this Court.

POINT II.

(Reason 5.)

The Trial Court denied a fundamental right of cross examination of Government Witness Richards to the vital prejudice of defendants.

Richards was the star witness for the Government. He was an agent-provocateur, claimed to have previously been employed by the F. B. I. although his status was not disclosed and the F. B. I. disclaimed him.

He testified to alleged damaging admissions made by the defendants, Schroeder, Lieblein and Bertram, at drinking parties he induced them to attend in his own apartment and elsewhere. After he had procured membership in the D. A. B. he attended Chapter meetings, made Pro-German inflammatory speeches. Much of his testimony was totally uncorroborated.

The witness claimed he helped mail the magazine "Amerika Deutsche" from G. A. V. L. Headquarters (R. 974a, 975a). Schroeder in 1941 showed the witness the letter of June 23, 1941, in the German language minute book (G-102) and told him it was issued to keep the F. B. I. off their trail and camouflage and smoke-screen their activities. It had been sent to all Vocational League United States members (R. 978a-983a). The witness also helped Lieblein destroy records at the League office because they feared an F. B. I. raid.

The witness admitted on cross examination that he had refreshed his recollection from notes he had turned into

the F. B. I. (which he refused to produce), that "he remembered what he was told to remember" by the F. B. I., that when off the stand he was in semi-custody of the U. S. Attorney's office and of an F. B. I. agent. Evenings between sessions he had conferred with the District Attorney and the F. B. I. representative. His memory had to be constantly refreshed.

Part of his story had been contradicted by Government witnesses Johnson and Griffin. His credibility was at stake.

The Trial Court overruled questions on cross examination as to his present occupation (R. 1722a-1723a), the date when he first became a special agent (R. 1728a-1730a), whether, when he graduated from Manhattan College in 1934 he went into business and what business (R. 1740a-1741a), whether when he ceased to be a re-write man, he started an investigation by himself (R. 1742a-1744a), whether in fact he was not, in 1935, a Government employee, including the F. B. I. (R. 1745a), whether he attempted to join several German organizations in order to investigate subversive activities (R. 1745a-1747a), whether he paid himself for publishing the book "America's Ju-Deal" or was paid for information secured (R. 1931a), when he was first regularly employed by the F. B. I. (R. 1967a).

Of this book he composed and published in 1935 under the alias "Franklin Thompson," he claimed that everything in it was lies, but he did a good job, was proud of it, saved his country a lot of trouble thereafter. He admitted it libelled the President, Supreme Court Justices Cardoza, Brandeis and Frankfurter, Ambassador Bullitt, Governor Lehman, Mayor La Guardia and Ambassador Steinhardt.

It stated that these Justices were part of the Ju-Deal, mentioned the gold clause decision, that Justice Frankfurter did not want the Constitution to stand in the way of the Ju-Deal (R. 1722a, 1789a), that the President's administration was predominantly Jewish, a vicious circle tending to draw America into a Communist-Jewish state, that the President was a tool of the Jews (R. 1779a), that Congress was turned into a convenient rubber-stamp (R.1780a). He admitted he wrote a letter to Hitler, introducing himself as unqualifiedly willing to serve my country whether she be right or wrong (R. 1775a).

His character, integrity and truthfulness were clearly at stake. His conceit knew no bounds. This reprehensible conduct, he claimed, was purely to gain entry to the Nazi movement. The defendants had a clear right to develop that he wrote the book to circulate in Germany or for blackmail—and that his incriminating testimony was either pure imagination or unadulterated perjury.

A thorough cross examination of so extraordinary a witness was demanded as a matter of right. It was attempted by counsel *assigned* to represent the defendants, yet the trial court demanded to know whether counsel *were able to disprove* what the witness said and on being advised that counsel did not yet know, this entire line of cross examination was overruled.

The interest of the witness, his relation to the "America's Ju-Deal", his purpose in publishing it, whether to gain admission to the German society, or for financial reward as an appeal to the German people, was of utmost importance in determining his credibility, interest and bias in order for the jury to properly evaluate his incriminatory testimony.

The scope of his direct examination opened his whole life, his background and motives to full cross examination. In this situation the limits of cross examination was not within the discretion of the learned Trial Court.

Alford v. *U. S.*, 282 U. S. 687 (1931);
Dist. of Columbia v. *Clawans*, 300 U. S. 617;
Cussack v. *U. S.*, 63 Fed. 2nd 833;
Tla-Koo-Yel-Lee v. *U. S.*, 167 U. S. 274;
People v. *Lurris*, 115 N. Y. Suppl. 237;
Minner v. *U. S.*, 57 Fed. 2nd, 512;
Mayer v. *U. S.*, 78 Fed. 2nd 629;
King v. *U. S.*, 112 Fed. 988;
Stephens Dig., Evidence cited in *King* v. *U. S.*;
7 Am. & Eng. Encyc. Law 102;
1 Greenleaf Evid., 15th Ed. Sec. 250 cited in *King* case.

POINT III.

(Reason (7))

The Trial Court erred in refusing to charge as requested the elements necessary to be proved to support the allegations of the indictment.

The indictment charges a conspiracy to violate the McCormack Act and to defraud the United States by, we assume, interfering with its governmental functions and the right to have the information which would be contained in a registration statement by D. A. B. if that corporation were required to register.

From a reading of the statute it is readily seen that it contemplates the registration of those who, by contract,

act as agents in various capacities of foreign principals, whether they be foreign governments, foregin corporations or nationals of other countries. The statute also contemplates that there must be a written or oral contract between the principal and agent because it requires that if the contract is written, a copy must be furnished, or if it is oral, there must be a statement setting forth in detail all of its terms. Furthermore the statute contemplates that it shall be a contract of employment.

It stands to reason that the statute contemplates that there is a mutual agreement between the agent and his principal and not a quasi-contract and that by the terms of that agreement the agent has agreed to act as such, as "agency" is defined in the statute. In the proof introduced by the government, as we have heretofore set forth, the witnesses Johnannsen and Volbers testified to the existence prior to 1938 of an agreement whereby the D. A. B. collected membership dues and forwarded a portion of the same to representatives of the German Labor Front, an instrumentality of the German Reich, in Berlin. It was also proven from the lips of these two witnesses that the agreement to forward a portion of the membership dues collected in the United States to Germany was cancelled in the early part of 1938 and before the passage of the act requiring registration. It further appears from the testimony of these two witnesses that there was also prior to the passage of the Act a settlement entered into whereby the German Labor Front agreed to refund to D. A. B. the dues which had been paid by members and forwarded to Berlin and which had been received subsequent to the year 1933. The dues amounted to between $12,000 and $13,000.

This is the only agreement that was proven and it was also proven from the lips of these same two witnesses, one of whom was the President of D. A. B. at the time and the other an officer, that no other contract or agreement of any kind, either express or implied, existed in 1938 between D. A. B. and any foreign principal. This agreement was cancelled and the case is barren of proof that any contract or agreement of any kind was made subsequently by D. A. B. with any foreign principal.

However, it was urged by the government and charged in the indictment that certain activities of D. A. B. and its various chapters were or must have been the result of some agreement or understanding and that the defendants by fraud and subterfuge and by failing to have D. A. B. register were concealing such agreement. The activities charged in the indictment, while innocent and lawful in themselves, although set forth in a colorful and exaggerated manner in the indictment, never were proven to have been the result of any contract or agreement, and, of course, if they were not the result of a proven contract or agreement, the whole case must fall.

As the government failed to prove any express contract of employment to carry on the activities mentioned in the indictment concerning which there was some proof, it became highly important for the court, particularly in a case of this character, to clearly instruct the jury on this point. In other words, it was highly important that the jury in its consideration of the facts in the case should not get the cart before the horse. as it were, and reach the conclusion that because the various chapters of D. A. B. received from time to time certain German language magazines, showed

German motion pictures, entertained various lectures on Germanic matters and fostered, for a short time, an English language magazine in which isolationist and anti-British views appeared, that these things were done necessarily pursuant to an existing contract of employment to do the same, and that even if they should find proof of an agreement that they must also find that a defendant before he could be convicted, knew of its existence and did something or had some part in carrying it out or in concealing it.

In order, therefore, that the jury might have explicit instructions on these matters counsel submitted to the Court requests 13 to 19, 25, 28 and 29, which appear on R. XXXa, but which, for the sake of convenience, are as follows:

> "13. The burden therefore rests upon the government to prove that in August, 1938 D. A. B. was acting and continued to act at the behest or command and under the direction of the German Government. In other words that D. A. B. was employed by the German Government to act as its agent."
>
> "14. The Government must prove who conducted the negotiations to bring about such relationship or employment and when the negotiations took place."
>
> "15. The nature of the task or tasks which D. A. B. was required to perform under such agency agreement must be proven."
>
> "16. If any such agency agreement for employment by the German Reich was entered into by any individual or individuals his or their authority to act for D. A. B. and its members must be proven."
>
> "17. There must be proof that such agreement was made known to each defendant on trial."

"18. There must be proof that each defendant on trial having knowledge of such agency agreement by some act or acts of his assisted or counseled or aided D. A. B. not to file the necessary registration certificate."

"19. There must be proof that each individual defendant on trial by some deceitful act of his or by authorizing or knowingly acquiescing in the deceitful act of others aided or assisted in causing D. A. B. not to file the registration statement required under the so-called McCormack Act."

"25. Under the First Amendment to the Constitution of the United States the right of free speech and of a free press is guaranteed to all. These are rights which cannot be taken away from us. We all have the right to have our own personal opinions on any subject and to express them publicly or privately, by word of mouth or by the written word. Nothing which may have been said or written by any of the defendants on trial expressing his own views on any subject, nor any of the articles appearing in the magazines in evidence are forbidden by law. Quite the opposite. And unless the things that may have been said and the articles that were published were intentionally spoken or published as German propaganda under an existing employment agreement of D. A. B. with the German Government no law of the United States has been violated and nothing that was said or published is any part of the conspiracy charged in the indictment."

"28. That the jury must find a corrupt intent on the part of each defendant in order to convict each defendant and that if they, the defendants, acted in the honest belief that the law did not require the D. A. B. to register, the jury must find that the defendants are not guilty."

"29. That mere concert of action is not conspiracy. Persons who agree to do the act, innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators because it turns out that the act would be prohibited by statute, or in the present case might be such an act from which the jury might infer evidence of a contract between the D. A. B. and the German Government."

That an indictment must contain all of the essential elements of the crime and that all of those essential elements must be proven, is elemental. *Pettibone* v. *United States*, 148 U. S. 197; *Brauer* v. *United States*, 229 Fed. 10; *United States* v. *Cruickshank*, 92 U. S. 542. The essential elements to be proven were in part set forth in these requests and were not otherwise charged by the Court. Failure to charge as requested, we urge, was reversible error.

Conclusion.

Your petitioners respectfully submit that the Circuit Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeals and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

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